FILE COPY

FILED

JUN 6 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1468

KENNETH T. BOSLEY AND PHYLLIS R. BOSLEY, HIS WIFE,

Petitioners,

v.

THE GRAND LODGE OF ANCIENT FREE AND ACCEPTED MASONS OF MARYLAND, A MARYLAND CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

CHARLES C. W. ATWATER,
MYLANDER, ATWATER, CARNEY & STONE,
402 One North Charles Street,
Baltimore, Maryland 21201,
Attorneys for Respondent.

The Daily Record Co., Baltimore, Md. 21203

Table of Contents

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	4
Argument:	
I. No Federal Question Was Raised at Any Stage in the Proceedings in the Court of First Instance or in the Court of Appeals of Maryland, and No Federal Question of Substance Is Raised in the Petition	5
II. The Question of Title to Land Located In the State of Maryland Is a Question of State Law Involving No Federal Question	8
III. Petitioners' Claim of *Res Judicata* Is Not Only Frivolous for Lack of Foundation, But Is Not Properly Before This Court	8
Conclusion	9
Certificate of Service	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1468

KENNETH T. BOSLEY AND PHYLLIS B. BOSLEY, HIS WIFE,

Petitioners,

V.

THE GRAND LODGE OF ANCIENT FREE AND ACCEPTED MASONS OF MARYLAND, A MARYLAND CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported in 263 Md. 303, 283 A. 2d 587 (1971). This opinion is extracted in Petitioners' Appendix, page 45.

JURISDICTION

Petitioners state that jurisdiction is invoked under 28 U.S.C., Section 1651(a).

The statutory provision cited by the Petitioners does not appear to be the proper provision. Jurisdiction properly should have been invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Respondent initiated this matter by filing an action for ejectment in the Circuit Court for Baltimore County against the Petitioners. The parcel of land in question had been acquired by deed by the Respondent in 1927. It is shown on the Petitioners' fold-out insert indicated as a 3.4 acre tract. Testimony was produced at the trial before the Court and a jury that, at the time of the purchase by Respondent of the tract of land, granite monuments were placed at each of the indicated positions around the 3.4 acre tract.

Petitioners own the adjacent parcel lying northerly of the stream known as Western Run. The line of division established by a deed of 1850 called to Western Run. Testimony indicated that the change from the "old stream bed" to the present one was by a sudden, violent change, i.e., by "avulsion".

The Respondent, Grand Lodge, claims good record title and title by adverse possession. The Petitioners' "extract" copy of the opinion of the Court of Appeals of Maryland (Pet. 12) omitted the questions as phrased by that Court as follows:

> "The two principal questions before us are whether the trial court erred (1) in its instructions to the jury in regard to the elements of adverse possession and (2) in declining to grant the motion of the Defendants-Appellants for a directed verdict or their motion for a judgment n.o.v. because of insufficient evidence in the case for the jury to find for the plaintiff, Grand Lodge, on the basis of either adverse possession or legal record

> title. The appellants raise additional questions to which reference will later be made."

The Court of Appeals of Maryland, as shown by its opinion, considered the basic issue to be the application of the real property law of the State of Maryland on the issues of record title and adverse possession. It found that the trial court's instructions to the jury properly stated the law and affirmed the judgment entered after the jury's verdict in favor of the Respondent, the Grand Lodge.

Petitioners repeat in their Questions Presented (Pet. 6) and in their Argument (Pet. 14) vague allegations of improper conduct by general counsel for the Grand Lodge, who did not act as trial counsel, but who testified as a witness. Petitioners now imply improper conduct by the Chief Judge of the Court of Appeals of Maryland and the judge who wrote the opinion for the Court (Pet. 14). These insinuations, lacking any support, are in essence scandalous matter which under the Rules of this Court, Rule 40, Paragraph 5, are improper.

The question now before this Court on the Petition for a Writ of Certiorari is restated by the Respondent as follows:

> Did the Court of Appeals of Maryland decide a Federal question of substance not theretofore determined by this Court?

Subsidiary questions might be:

> Was any Federal question raised at any stage in the proceeding in the court of first instance or in the Court of Appeals of Maryland?
>
> Is there any basis for Petitioners' claim that they have been "denied their rights of due process of law"?

STATEMENT OF THE CASE

The petition to this Court for a writ of certiorari to the Court of Appeals of Maryland seeks to review the decision of that Court which affirmed the judgment of the Circuit Court for Baltimore County, Maryland, in favor of Respondent, the Grand Lodge of Ancient Free and Accepted Masons of Maryland, entered on a verdict of a jury in an action for ejectment.

The claim of the Petitioners Bosley was based upon a deed dated November 11, 1850, to their ancient predecessor in title, one Thomas H. Matthews, which called to Western Run stream as a boundary line.

Respondent purchased in 1927 the property which is used by it as a lodge home for elderly members and as a farm. A portion of the property included within the description and survey prepared June 20, 1927, included the 3.4 acre tract which is the subject of the ejectment proceeding. The Respondent claimed title based upon open, notorious, hostile, adverse possession of the property since 1927 and also claimed record title based upon the line called for by the old stream bed, the record title remaining unchanged because the stream bed had changed by a sudden violent change, avulsion, rather than by erosion. The instructions of the trial court to the jury submitted both issues of fact to the jury. These instructions were reviewed thoroughly and approved by the Court of Appeals of Maryland.

Petitioners have not filed the record in this proceeding, and the Petition with the Appendix abstracts many documents, even the opinion of the Court of Appeals of Maryland. The questions before the Court of Appeals as noted previously herein were principally (1) the correctness of instructions to the jury and (2) the correctness of the trial

court's refusal to grant a directed verdict or a motion for judgment *non obstante veredicto.*

Additional questions concerned the alleged "conflict of interest" of the court reporter and Mr. John H. Hessey, Sr., because the court reporter was a member of the Masonic order and Mr. Hessey has for many years been general counsel for the Grand Lodge. The Court of Appeals held in its opinion (Pet. 51, 263 Md. 303 at 325-326), that the charges were without foundation and also noted that they were also not properly before the Court because they were not raised in the trial court. These charges are now the basis for the claim of lack of due process made by the Petitioners.

ARGUMENT

I.

NO FEDERAL QUESTION WAS RAISED AT ANY STAGE IN THE PROCEEDINGS IN THE COURT OF FIRST INSTANCE OR IN THE COURT OF APPEALS OF MARYLAND, AND NO FEDERAL QUESTION OF SUBSTANCE IS RAISED IN THE PETITION.

Petitioners' claim that they have been "denied their rights of due process of law" would form the basis for this Court to exercise jurisdiction, provided there was any substantial support in the record for their allegation that they have been deprived of life, liberty, or property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The considerations which this Court has followed in determining whether or not it would exercise its judicial discretion to grant a petition for certiorari to a state court have long been established and have been set forth in Rule 19 of the Supreme Court Rules. The Petition, even when carefully considered by counsel with full knowledge of the record, and when all consideration is given to the inept and confused presentation of facts in the Petition, is utterly

lacking in any showing of facts or circumstances involving a Federal question, much less a Federal question of substance. The Petition, on the contrary, affirmatively shows that such an issue was not raised at any stage in the proceeding. The scholarly opinion of the Court to which certiorari is sought reviews in considerable detail the procedures followed, the questions raised and the testimony which was the basis of the jury's verdict and the judgment of the trial court, all analyzed within the principles of the common law as applied in Maryland. Nowhere is there any claim of denial by Petitioners of any Federal right nor even a reference to "due process".

Petitioners appear to claim that the alleged conflict of interest because of membership in the Masonic order of witnesses for the Respondent and the court reporter constitute a denial of due process. Such a claim is at best frivolous and unsubstantial. We must specifically refer to the allegation of the Petitioners that "five extensions of time for transmittal of the records were required because the court reporter did not have time to transcribe the testimony." We hesitate to characterize this attack by Mr. Bosley on his fellow Mason, but the Court should be informed that the necessity for the extensions of time was simply the result of the failure of the Petitioners to comply with the rules of the Baltimore County Court that the court reporter should be paid before the record is transcribed and filed. Mr. Underwood's reputation with the Bar and the judiciary in Maryland needs no defense, but this deliberate, false, slanderous attack is resented and must be denied by counsel. We have yet to hear an answer to the question asked by a member of the Court of Appeals of Maryland during oral argument which arose as follows:

> Mr. Bosley said that two of the key witnesses were Masons and their testimony would be "prejudiced and untrue". The judge thereupon asked Mr. Bosley if he

himself were not a Mason. He replied in the affirmative and added that he was an "inactive Mason". The judge then asked, "Are we to assume that only the word of 'inactive Masons' can be relied upon?"

The Petitioners seek to buttress the claim of denial of due process (Pet. 14) by intimations that the Chief Judge of the Court of Appeals of Maryland and the associate judge who wrote the opinion, The Honorable Wilson K. Barnes, should have disqualified themselves because the Chief Judge had served as a member of a board of a Baltimore hospital when Mr. John H. Hessey also served in that capacity, and because Judge Barnes at one time was on the faculty of a law school at the same time Mr. Hessey was a member of that faculty. It is difficult to conceive that these scandalous implications of improper conduct set forth under the cloak of immunity from the laws of slander can furnish any support for a claim of denial of due process. The Petitioner, Kenneth T. Bosley, shows after his signature that he has a Juris Doctor degree. If nothing else, he appears to have learned the doctrine of privilege applicable to legal pleadings which would otherwise constitute actionable slander.

The further allegations in the Petition concerning the "secret preparation of minutes" and the bald denial that the Grand Lodge is a charitable organization are not only offensive to anyone with a knowledge of the Masonic organization, but, as noted by the Court of Appeals of Maryland, would apply equally to the Petitioner, Kenneth T. Bosley, who for reasons unknown to counsel has been and now is a member of the Masonic organization.

We, therefore, submit that there is no basis for the Court's jurisdiction and no showing of any reason why this Court should exercise its discretion and grant the writ of certiorari because of any Federal issue.

II.

THE QUESTION OF TITLE TO LAND LOCATED IN THE STATE OF MARYLAND IS A QUESTION OF STATE LAW INVOLVING NO FEDERAL QUESTION.

The Petitioners appear to base their primary attack upon the decision of the Court of Appeals of Maryland on the theory that the Court improperly applied the real property law of the State of Maryland. They argue that the Maryland court applied real property rules which are not applicable in the eastern section of the United States.

The record, if it had been filed, would fully support the findings as set forth in the opinion of the Court of Appeals of Maryland that the question was properly submitted to the jury of whether the stream bed changed as the result of avulsion rather than as the result of a gradual erosion. The rule as set forth by Mr. Justice Brewer in *Nebraska v. Iowa*, 143 U.S. 359, 360-361, 12 S. Ct. 396, 397, 36 L. Ed. 186, 187-188 (1892), was quoted and followed. This Court, of course, had original jurisdiction in that case because the question involved was the boundary between the states of Nebraska and Iowa. The sketch plat set forth with the opinion of this Court in that case shows a remarkable similarity to the plat contained as a fold-out insert in the Petition in this case.

This question is solely a question of the real property law of the State of Maryland and follows basic common law rules as well as the early French law quoted by Mr. Justice Brewer.

III.

PETITIONERS' CLAIM OF *RES JUDICATA* IS NOT ONLY FRIVOLOUS FOR LACK OF FOUNDATION, BUT IS NOT PROPERLY BEFORE THIS COURT.

Petitioners argue that the boundary line involved in this proceeding had been determined in a proceeding in the

United States District Court for the District of Maryland, *Atlantic Seaboard Company, Plaintiff v. The Grand Lodge of Ancient Free and Accepted Masons, Defendant, and Kenneth T. Bosley, et ux., Intervenors,* Civil No. 16736, in an opinion by Chief Judge Roszel C. Thomsen (Pet. 16, 34). That proceeding was a condemnation proceeding for the location of a pipeline which is indicated on the fold-out insert in the Petition with the typed description "Center-line of Easement for Proposed Gas Pipe Line". Petitioners argued in the trial court and in the Court of Appeals of Maryland that the stipulation in that case was *res judicata* of the issue in this case. The Petition fails to point out, although it is indicated on the plat, that the location of the boundary line so stipulated is approximately 1,600 feet from the parcel in question. Petitioners fail to quote the stipulation, which is quoted in the opinion of the Maryland Court of Appeals, as abstracted in the Petition (Pet. 50). The trial court and the Court of Appeals both noted that there was no identity of subject matter, and, therefore, the doctrine of *res judicata* does not apply.

Petitioners further fail to show in what manner the issue of *res judicata* is a Federal question.

CONCLUSION

The Petition for Writ of Certiorari should be denied for lack of any Federal question.

Respectfully submitted,

CHARLES C. W. ATWATER,
MYLANDER, ATWATER, CARNEY & STONE,
Attorneys for Respondent.

June 5, 1972.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief for Respondent in Opposition were mailed by first class mail, postage prepaid, to Mr. and Mrs. Kenneth T. Bosley, York Road, Sparks, Maryland 21152, this 5th day of June, 1972.

CHARLES C. W. ATWATER,

Of Counsel for Respondent.